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In The

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-221

PHILLIPS PETROLEUM COMPANY,
Petitioner,

vs.

ASHLAND OIL, INC., et al.,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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TABLE OF CONTENTS

OPINIONS BELOW 1
QUESTIONS PRESENTED 1
STATUTES INVOLVED 2
STATEMENT OF CASE 3
ARGUMENT 9

I. The Court of Appeals Correctly Decided That Federal Law Should Be Applied to the Peripheral Issues of Prejudgment Interest, Limitations and Attorneys' Fees 10

II. The Court of Appeals, in Following Its Decision in Northern Natural Gas Company vs. Grounds, Correctly Held That Federal Law Precluded Phillips' Defense of Payment 15

CONCLUSION 18
APPENDIX 21

Index to Citations

CASES

American Pipe & Construction Co. v. *Utah*, 414 U.S. 538 (1974) 14
Ashland Oil & Refining Co. v. *FPC*, 421 F.2d 17 (6th Cir. 1970) 6, 18
Burnett v. *New York Cent. R. Co.*, 380 U.S. 424 (1965) 14
Carpenter v. *Josey Oil Company*, 26 F.2d 442 (8th Cir.) 16
Clearfield Trust Co. v. *United States*, 318 U.S. 363 (1943) 12, 13, 14
F. D. Rich Company v. *Industrial Lumber Company*, 417 U.S. 116 (1974) 8

Grand Bahama Petroleum Company v. *Asiatic Petroleum*, 550 F.2d 1230 (2nd Cir. 1977) 14
Johnson v. *Railway Express Agency*, 421 U.S. 454 (1975) 14
Miree v. *DeKalb County*, No. 76-607, decided June 21, 1977 13
Northern Natural Gas Company v. *Grounds, et al.*, 441 F.2d 704 (10th Cir.), cert. denied, 404 U.S. 1063 (January 24, 1972) 2, 3, 4, 6, 8, 9, 10, 11, 15, 16, 17, 18, 19
Phillips Petroleum Company v. *Ashland Oil & Refining Company*, 40 FPC 390 18
Phillips Petroleum Company v. *Texaco*, 415 U.S. 125 (1974) 7, 9, 10, 11, 16
Phillips Petroleum Company v. *Wisconsin*, 347 U.S. 672 (1954) 17
Sola Electric Company v. *Jefferson Electric Company*, 317 U.S. 173 (1942) 14
United States v. *County of Allegheny*, 322 U.S. 174 (1944) 12
Western Union Telegraph Company v. *Esteve Brothers & Company*, 256 U.S. 566, 571, 41 S.Ct. 584, 56 L.Ed. 1094 14

STATUTORY PROVISIONS

Section 4 of the Natural Gas Act, 52 Stat. 822, 76 Stat. 72, 15 U.S.C. §717c 2
Section 4(b) of the Natural Gas Act, 17 U.S.C. §717c(b) 17
Section 11 of the Helium Act, 74 Stat. 922, 50 U.S.C. §167i 2, 5, 16
Tex. Ann. Stat., Art. 2226 7
28 U.S.C. §1331(a) 7
50 U.S.C. §§167a, et seq. 3
50 U.S.C. §167d 4

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OPINIONS BELOW

The opinions delivered in the courts below (A. 3a, 53a) are reported in 554 F.2d 381 (10th Cir.), and 364 F.Supp. 6 (N.D. Okla.).

QUESTIONS PRESENTED

1. In a suit by a gas producer to recover the reasonable value of helium delivered by it to a helium extractor, did the court of appeals correctly hold that federal law should apply to the peripheral issues of prejudgment interest, limitations, and attorneys' fees, when:

(a) the United States acquired the extracted helium from the extractor under a long-term government contract obligating the government to pay a base price, plus certain additional amounts which the helium extractor was required to pay to the producer for the helium delivered, as a result of this litigation; and

(b) the producer's *quantum meruit* right of recovery arose because superseding federal statutes and regulations requiring uniform national application dictate that the helium extractor's payment for natural gas, in which the helium is commingled, does not constitute any payment for helium contained therein?

2. Did the court of appeals correctly hold that the helium extractor's payment to the producer of a rate for natural gas, filed with and approved by the Federal Power Commission as authorized by the Natural Gas Act, was not a payment for helium commingled with the natural gas, when:

(a) Section 11 of the Helium Act provides that rates authorized by the Natural Gas Act are not applicable to helium commingled in natural gas; and

(b) this question was previously decided in *Northern Natural Gas Company* v. *Grounds, et al.*, 441 F.2d 704 (10th Cir.), and certiorari was denied by this Court, 404 U.S. 1063 (January 24, 1972)?

STATUTES INVOLVED

Subsections (a), (b) and (c) of Section 4 of the Natural Gas Act, 52 Stat. 822, 76 Stat. 72, 15 U.S.C. §717c; and Section 11 of the Helium Act, 74 Stat. 922, 50 U.S.C. §167i, are reprinted in the Appendix to this brief, infra.

STATEMENT OF CASE

Helium is a rare, noncombustible gaseous element whose unique qualities have made it indispensable for innumerable uses by industry and the government. Its only commercial source is from natural gas with which it is commingled. Ninety-nine percent of the nation's (and the free world's) native helium resources are contained in the Hugoton-Panhandle Gas Fields of Southwestern Kansas, Western Oklahoma and Northwestern Texas.

Reflecting the urgent need to conserve this valuable natural resource for the future, when these gas fields would be depleted by use of the natural gas for fuel purposes, Congress in 1960 authorized the Secretary of Interior to enter into long-term contracts for conservation of this helium. 50 U.S.C. §§167a, et seq. Section 11 of the Helium Act provided that the Natural Gas Act should not be applicable to this commingled helium.[1]

In 1961 the Secretary entered into long-term helium acquisition contracts with petitioner, Phillips Petroleum Company, and with three other companies, all of whom controlled the flow of helium-bearing natural gas at large centrally located pipelines. Anticipating future claims by lessee-producers, such as Ashland Oil, Inc., for a helium payment (441 F.2d at 709), the government contracts contained special price provisions, under which the government was obligated to pay, *first*, base prices averaging $11.00 to $12.00 per m.c.f. of extracted helium, and, *second*, an additional amount equivalent to the price required to

1. The facts relating to helium and the conservation program are recited in *Northern Natural Gas Company* v. *Grounds*, 441 F.2d 704, cert. denied, 404 U.S. 951, 1063. Other facts also in the present Record, consisting of three volumes of the Appendix below, plus seven volumes of an Exhibit Appendix, are hereafter cited as "R. Vol. ....."; and as "R. Ex. Vol. .....".

be paid to third parties for the commingled helium supplied by them (less approximately $3.00 per m.c.f., which Phillips Petroleum Company, and the other companies assumed). (R. Ex. Vol. I, p. 93).

Accordingly, these four companies commenced extracting the helium in about January, 1963, delivering it to the government for storage in an underground reservoir near Amarillo, Texas. The government is mandated by statute to store the helium for future sale and beneficial use, so that the ultimate sales proceeds will repay all costs, including all acquisition costs, and interest. 50 U.S.C. §167d. There is no doubt that it will do so, because, upon depletion of commercial sources in natural gas, helium will have to be obtained from the atmosphere at costs approximating $6,000.00 per m.c.f. (ERDA Report, April 11, 1975). This compares to purified helium competitively marketed during the years in question, 1963-1972, at prices ranging from $35.00 to $20.00 per m.c.f. (The crude, or impure, helium acquired by the government for conservation storage, costs $2.00 per m.c.f. to purify.)

In 1963 the three other companies who had contracted to extract and deliver conservation helium to the government filed class action interpleader cases in the United States District Court for the District of Kansas, against certain gas producers supplying helium to the plants, and against landowners having royalty interests under oil and gas leases from which the helium-bearing natural gas was produced, seeking to determine liability for payment to these parties. Landowner class representatives also filed suits against the government in the same court concerning helium payment. Both Ashland Oil and Phillips Petroleum Company were parties to two or more of these cases, all of which were consolidated as *Northern Natural Gas Company* v. *Grounds, et al.*

Among massive consolidated pleadings filed by landowners in the Kansas cases were class action claims against Phillips Petroleum relating to helium extracted by it. Ashland Oil then filed pleadings seeking to make claim against Phillips Petroleum Company. The court order consolidating the cases also enjoined all parties from filing any other actions concerning the subject matter of the suits. (Docket #81, KC 1969). However, by early 1967, landowners had dismissed their claims against Phillips, and Ashland withdrew its claim against Phillips, without prejudice to filing a separate action against Phillips, which was approved by order of the Kansas court. (R. Ex. Vol. VI, pp. 1268-1269).

The present action was then promptly commenced by Ashland Oil against Phillips in March, 1967. In addition to seeking recovery for the value of commingled helium supplied to Phillips for extraction and delivery to the government, this suit also sought to recover over one-half million dollars for Phillips' deficiencies in payments for jurisdictional natural gas delivered.[2] Ashland's natural gas sales contracts with Phillips provided a formula for price increases tied to price increases obtained by Phillips on resale of the natural gas to Michigan-Wisconsin Pipeline Company. All these sales were subject to FPC rate regulation. Ashland had not filed with the FPC for increases in rates to which it was entitled, but Ashland claimed that Phillips' own filings as a gasoline plant operator were sufficient to cover Ashland's price increase. (R. Vol. I, pp. 1, 8, 33; R. Ex. Vol. I, pp. 1-34).

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2. Jurisdictional natural gas is the hydrocarbonous fuel regulated by the Federal Power Commission. The noncombustible helium commingled with natural gas is not subject to FPC jurisdiction. 50 U.S.C. §167i.

Phillips then initiated a proceeding before the Federal Power Commission asking that agency to assert its primary jurisdiction to determine that Ashland was not entitled to payment of the deficiency because it had not filed for an increase with the FPC. The FPC ruled in favor of Phillips, but in doing so carefully noted that it had no jurisdiction over the price of the commingled helium delivered by Ashland. 40 FPC 390. The Sixth Circuit affirmed this decision in *Ashland Oil & Refining Co.* v. *FPC*, 421 F.2d 17 (1970).

Thus, there remained only the claim against Phillips for payment of the reasonable value of the helium delivered to Phillips. The United States intervened as a party because of its contract obligation requiring it to reimburse Phillips for part of the helium payment. (R. Vol. I, p. 63). The district court in Oklahoma stayed the action pending appeals then being taken from the Kansas consolidated cases on the question of entitlement to helium payment. In *Northern Natural Gas Company* v. *Grounds*, 441 F.2d 704 (10th Cir. 1971), cert. denied, 404 U.S. 951, 1063, the court ruled that payment of FPC service rates for jurisdictional natural gas did not constitute any payment for helium so that producers delivering the commingled helium were entitled to a *quantum meruit* right to recover the reasonable value of their helium from the three other companies, subject to a requirement that royalty payments be made by producers to landowners having royalty interests.

After this Court denied certiorari in those cases in January, 1972, this case proceeded to trial and judgment in 1973. (364 F. Supp. 6). As required by the *Grounds* decision, Ashland was awarded a reasonable value for its helium. Determining that federal policies were applicable,

the district court also awarded Ashland prejudgment interest, and held that Ashland was not barred by limitations. Based on federal Miller Act cases which had held that state statutes for attorneys' fees in like cases should be adopted as federal law, the district court also awarded Ashland attorneys' fees under a Texas state statute. Tex. Ann. Stat., Art. 2226.

Prior to argument and decision in the appeals by Phillips and the United States, this Court decided *Phillips Petroleum Company* v. *Texaco*, 415 U.S. 125 (1974), holding that a claim for reasonable value of helium against Phillips was a quasi-contractual action or one in *quantum meruit* "whose source is state law and not federal law." Thus federal question jurisdiction under 28 U.S.C. §1331 (a) did not exist. However, this Court gave full recognition to the determinative impact of federal law in precluding any state law *defense* that payment of the contract price for natural gas, filed as an FPC rate, constitutes payment for the commingled helium:

> ". . . The essence of the Grounds decision was its rejection of the buyers' [Phillips'] contention that the contract price was compensation for the gas stream in its entirety . . ." (415 U.S. at 126).
>
> ". . . In other words, the Grounds case simply held that payment for natural gas at rates established or permitted by the Commission under the authority of the Natural Gas Act will not be regarded as payment for the helium constituent and cannot be asserted as a defense to a suit for the recovery of the value of that helium. . ." (415 U.S. at 128).

Thus, in this diversity jurisdiction case, the court of appeals strictly adhered to this Court's analysis of the

Grounds decision by ruling that Phillips' defense of payment of a contract price for natural gas, a rate filed with the FPC, was of no avail, and that Ashland was entitled to recover the value of its helium. (554 F.2d at 384). Recognizing the impact of federal statutes, and the direct result of a recovery by Ashland upon the United States itself, the court ruled that federal law should be applied to the peripheral issues of prejudgment interest, limitations, and attorneys' fees; just as federal law itself should be applied, as this Court had recognized, to preclude a defense of payment. Thus, it affirmed the award of prejudgment interest, and held that any limitations statute was tolled by reason of the Kansas litigation which had effectively prevented Ashland from filing suit until permitted by the Kansas federal court order in early 1967. But it reversed the district court award of attorneys' fees based upon this Court's later decision in *F. D. Rich Co.* v. *Industrial Lumber Co.*, 417 U.S. 116 (1974) (which reversed the line of Miller Act cases on which the district court had relied). (554 F.2d at 389-392).

The court of appeals granted a rehearing *en banc* because the district court of Kansas in the *Grounds* case had made some disparate findings on the factual dispute concerning value of helium, which needed to be resolved on a consistent basis. Accordingly, the *en banc* decision essentially adhered to the initial three-judge decision, but remanded several factual matters for further hearing in the district court. (554 F.2d at 392).

ARGUMENT

In awarding Ashland the reasonable value of its helium, the court of appeals applied the law enunciated in its *Grounds* decision, which had denied the precise defense of payment which is now pursued by Phillips in its petition. This Court denied petitions for certiorari in *Grounds* which raised the precise point Phillips now raises; and in *Phillips Petroleum Company* v. *Texaco*, 415 U.S. 125, this Court also recognized that the applicable federal statutes precluded Phillips' defense of payment of a contract price filed as a natural gas rate schedule with the FPC. The attempt, at this late date, to renew this rejected defense, is without merit, and should be denied.

The only question present here which was not considered in *Grounds* is whether federal law or state law should be applied to the peripheral issues of prejudgment interest, limitations, and attorneys' fees. Because of federal nondiscriminatory natural gas rate policies, and because the government's contract obligations would be directly affected by this litigation, the court of appeals was obliged to apply federal law, so as to prevent a nightmare of conflicting results based upon the divergent laws of different states.

The decision below is in accord with analogous decisions of this Court, and is not in conflict with any other decision. It accomplishes substantial justice by requiring payment of a reasonable value for the unregulated commodity, helium, to those producing and supplying it. It in no way affects consumer prices for natural gas. It permits the helium extractors to profit from their unregulated helium extraction operations, while at the same time requiring them to pay helium suppliers, who would other-

wise receive no payment for the valuable commodity they supply.·

I. The Court of Appeals Correctly Decided That Federal Law Should Be Applied to the Peripheral Issues of Prejudgment Interest, Limitations and Attorneys' Fees

In its petition, Phillips presents a spurious question concerning federal law, induced largely by a faulty analysis of *Northern Natural Gas Company* v. *Grounds*, 441 F.2d 704, cert. denied, 404 U.S. 1063, and of *Phillips Petroleum Company* v. *Texaco*, 415 U.S. 125 (1974). In doing so, Phillips unfairly charges the court of appeals of attempted "evasion" of this Court's *Texaco* holding. Nothing could be further from the truth.

A casual review of the *en banc* opinion reveals that the court of appeals rejected Phillips' defense of payment based on its holding in *Grounds*, which had definitively ruled against its position. As this Court noted in *Texaco*, Phillips is precluded from raising the defense of payment under state law because of the "federal statutory provisions . . ." (415 U.S. at 128). Although federal question jurisdiction did not exist, obviously federal law was applied to preclude defenses, and this federal law, therefore, superseded any state law to the contrary.

The transparent attempt by Phillips to infer from the *Texaco* holding concerning lack of federal question jurisdiction, the result that federal law was wholly irrelevant to the controversy, is so obviously erroneous that little further discussion is warranted.

This is made plain again by the *en banc* decision below in discussing the issues of prejudgment interest, limitations and attorneys' fees. (554 F.2d at 389, et seq.).

For it is only in connection with these issues that the court of appeals discussed the question of federal *vs.* state law. The court, of course, recognized that federal law had been "applied" on the issue of liability, just as this Court recognized in *Texaco* that federal law was applied to preclude the defense of payment. But that was a point already settled.

Having already, in *Grounds*, applied provisions of the federal Natural Gas Act and Helium Act to determine that jurisdictional natural gas rates did not provide payment for nonjurisdictional helium, it remained for the court to analyze the federal policies and the interest of the government on the peripheral issues mentioned. The government contract with Phillips was an important element in the decision to apply federal law. This contract, as well as the other helium conservation contracts, was the device utilized by the government to acquire the helium because it was recognized that condemnation proceedings involving thousands of royalty owners and producers would be unmanageable and cause great delay in conservation. (554 F.2d at 384).

The price provision of the government contract provided for an initial base price, but also provided that the government would pay additional amounts which Phillips became obligated to pay third parties, less about $3.00 per m.c.f. which Phillips assumed. Anticipating litigation, the contract stated:

> ". . . Any such payment to qualify for inclusion hereunder shall be made only with the consent of Buyer [United States] and for the purposes of this paragraph 7.4 Buyer shall be deemed to have consented to any and all such payments in satisfaction or settlement of any claims to helium in the natural gas, as

defined herein, or to any interest in such helium that have been judicially determined in favor of any claimants by any Federal court or the highest appellate court of any state." (R. Ex. Vol. I, p. 93).

It was because the government had, by contract, already agreed to be bound by the results of litigation against Phillips, that it intervened below to protect its interest. The judgment in this case directly affects the government's obligation to pay under the contract. Moreover, it was in the interest of the government to perfect its title to the conservation helium by making appropriate payment. Contrary to petitioners' contention, absent payment for the helium, "title fails just as surely as it does where either restitution or rescission is appropriate." (441 F.2d at 723).

The court of appeals *en banc*, noted the obvious fact that there were a "multitude of interest owners from many states relating to production from Kansas, Oklahoma, and Texas" and that there were divergent laws in those states on the pertinent questions. (554 F.2d at 390).

In these circumstances application of the doctrine of *Clearfield Trust Co.* v. *United States*, 318 U.S. 363 (1943), and the line of cases following it, as discussed in the opinion below, was clearly called for. Among the cases cited in the opinion is *United States* v. *County of Allegheny*, 322 U.S. 174 (1944), in which the government contracted with a gun manufacturer, and agreed in the contract to reimburse all costs, including any local taxes imposed on the contractor for its use of government owned machinery, which were sustained by litigation. The United States intervened because of its contractual obligation to reimburse the contractor. This Court held federal law must govern.

The correctness of the *en banc* decision is also highlighted by this Court's recent case of *Miree* v. *DeKalb County*, No. 76-607, decided June 21, 1977. Survivors of persons killed in a plane crash sued the county, alleging they were third party beneficiaries of a contract between the county and the FAA. Since no substantial rights or duties of the United States hinged on the outcome of the litigation, the *Clearfield Trust* rationale was held inapplicable. This was only because the litigation "raises no question regarding the liability of the United States or the responsibilities of the United States under the contract."

In contrast to the facts in *Miree*, here the liability of the United States is directly affected by the outcome of this litigation, which was anticipated and provided for in that contract.

Considering that the federal helium conservation program involves helium from three states, and involved parties from many states, and the divergent laws of these states, it would be wholly improper to deny the clear application of the *Clearfield Trust* doctrine as expounded in the later cases. Moreover, any one claimant may have helium-bearing gas with sources in three different states pass through one helium conservation plant. Must the government's rights and obligations vary as to that one claimant by distinguishing the helium originating in each state? To ask this question is to answer it. As stated below:

> ". . . In the face of the multitude of claimants, the variations in state law, and the *Clearfield* doctrine, the trial court was correct in not applying *Erie* v. *Tompkins*." (554 F.2d at 391).

Moreover, the federal statutes, construed in *Grounds*, which preclude the defense of payment, so dominate the practical results of the controversy, that peripheral questions should be uniformly decided to accomplish the uniformity and nondiscrimination mandated by these statutes. *Sola Electric Co.* v. *Jefferson Electric Co.*, 317 U.S. 173 (1942); *Grand Bahama Petroleum Co.* v. *Asiatic Petroleum*, 550 F.2d 1230 (2nd Cir. 1977).[3] The principles of *Sola Electric*, requiring applicable federal policies to be effectuated in a diversity case, therefore, require application of federal law to the peripheral issues herein, entirely apart from the *Clearfield Trust* doctrine.[4]

Petitioner's assertion that the valuation method approved by the *en banc* opinion was dependent on applying federal law is not well taken. As indicated in the opinion, the valuation method approved is widely used in the oil and gas producing states, particularly in determining value of components of a gas stream which are extracted in a field plant. The value of the component, such as helium, or gasoline liquids, prior to extraction is directly related to its wholesale value after extraction, taking into account the expenses and a profit for the plant operator.

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3. The court of appeals found it unnecessary to decide whether the two year, or four year, Texas limitation statute applied, because it considered any limitation statute to be tolled, referring to the related Kansas cases. As previously indicated, those class actions involved claims against Phillips which were not eliminated until January, 1967, in an order which then, for the first time, permitted Ashland to file a separate suit, free from the existing injunction. *American Pipe & Construction Co.* v. *Utah*, 414 U.S. 538 (1974). These facts distinguish *Johnson* v. *Railway Express Agency*, 421 U.S. 454 (1975), cited by petitioner, see discussion in 421 U.S. at 467. *Cf.*, *Burnett* v. *New York Cent. R. Co.*, 380 U.S. 424 (1965).

4. Phillips' petition does not present any reason why it should not pay interest on the value of helium supplied by Ashland. The limitations question is unique to Phillips, and is not present in *Grounds*. Applying federal law enabled Phillips to avoid liability for attorneys' fees under a state statute. These peripheral issues, thus, are of limited significance.

Both state and federal courts, and the government itself, regularly apply this method in appropriate circumstances involving applications of both federal and state law.[5]

II. The Court of Appeals, in Following Its Decision in Northern Natural Gas Company vs. Grounds, Correctly Held That Federal Law Precluded Phillips' Defense of Payment

In asserting that its payment of FPC rates for natural gas also constitutes payment for nonjurisdictional helium, Phillips is, in reality, seeking review of the *Grounds* case, in which this Court denied certiorari more than five years ago.

Grounds held that the helium extracting natural gas companies must pay reasonable value for helium, without reference to the contract price, whether that price was more than, the same as, or lower than the FPC ceiling rate:

> "In answer the Helex companies say that under the Natural Gas Act the FPC fixes ceiling prices and does not impose a flat rate. Although this is true, the ceiling rate, or the lower filed rate, is the lawful rate and there may be no deviation therefrom. See *Western Union Telegraph Co.* v. *Esteve Brothers & Co.*, 256 U.S. 566, 571, 41 S.Ct. 584, 56 L.Ed. 1094. Section 4(b) of the Natural Gas Act, 17 U.S.C. Sec.

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5. The single dissent from the *en banc* decision concerned factual issues relating to helium value, and did not disagree with the points sought to be reviewed by Phillips. In going beyond the record, the dissent unfortunately exaggerated the amount of helium subject to value litigation by some 200%. For example, the Phillips-U.S. contract provided that the U.S. need pay nothing additional for helium produced from Phillips' own leases. Phillips produced 50% of all the helium it extracted and delivered to the United States.

717c(b), forbids 'any undue preference or advantage' to any person." (441 F.2d at 720).

The Federal Power Commission rate for natural gas is, by law, limited to the natural gas over which it has jurisdiction under authority of the Natural Gas Act. Section 11 of the Helium Act, 50 U.S.C. §167i, provides that the Natural Gas Act does not apply to sale or delivery of helium commingled in the natural gas. Thus, the law mandates that FPC natural gas service rates do not, and cannot, constitute a payment for commingled helium. There is no contract provision between Ashland and Phillips that specifies a payment for commingled helium. The contracts merely provide a price per m.c.f. Thus, whether the FPC allows that stated price, or a different price, as a natural gas rate, the payment of that rate is clearly not for helium. To then allow Phillips to have valuable helium without payment would be "startling", to use the court's languge in *Grounds* (441 F.2d at 719).

It is for these elementary reasons that this Court in *Phillips Petroleum Company* v. *Texaco*, 415 U.S. 125 (1974), recognized that Phillips' defense of payment was precluded by federal law, giving rise to a claim in *quantum meruit* for reasonable value. *Quantum meruit* refers to that class of obligations "imposed by law, without regard to the intention or assent of the parties bound, for reasons dictated by reason and justice." *Carpenter* v. *Josey Oil Co.*, 26 F.2d 442 (8th Cir.).[6]

6. Phillips' argument that under Texas law, an express contract precludes recovery on an implied contract (Petition, p. 23), wholly ignores that its defense of payment cannot be asserted because of applicable federal law. It also ignores the recognition by this Court in *Phillips Petroleum Company* v. *Texaco* that the claim against Phillips is in *quantum meruit*, a claim not based on express or implied contract, but based, rather, on an obligation imposed by law regardless of the assent of the parties.

Phillips asserts that it should not pay for valuable helium, beyond FPC rates for jurisdictional natural gas. This would result in absolutely no payment for the helium itself. In fact, the helium value obtained by Phillips, if not paid for, as a practical matter results in its obtaining jurisdictional natural gas for a fraction of the FPC natural gas rate, which other natural gas companies, not extracting helium, must, however, pay in full. This is not reasonable, and it is not justice. Moreover, as noted by the court of appeals in *Grounds*, that result would directly violate Section 4(b) of the Natural Gas Act, which forbids "any undue preference or advantage" to any person.

The *Grounds* case was decided upon a complete record containing gas contracts filed as FPC rate schedules, having prices higher than, the same as, and lower than, the approved FPC rate.[7] The position now urged by Phillips was urged in *Grounds*, and in petitions for certiorari to this Court, as well as in the Memorandum of the United States in support. For the compelling reasons stated in *Grounds*, this position was correctly rejected.

Thus, even were we to accept Phillips' contention that its gas contract prices are unaffected in amount by FPC regulation, its argument is untenable. However, Phillips fails to tell the whole truth about its contract prices. As we have noted herein, Ashland's contract prices are tied to increases in rates obtained by Phillips from Michigan Wisconsin Pipeline Company to whom it resells the natural gas. Phillips' rates to that purchaser are directly regulated and limited by the FPC, as a result of the decision in *Phillips Petroleum Company* v. *Wisconsin*, 347 U.S. 672 (1954), which case involved that very transaction. By

7. In *Grounds*, the court of appeals found it unnecessary to consider other theories for recovery of a helium payment.

this means, Ashland's contract prices, filed as FPC rates, are directly limited, affected and regulated under the Natural Gas Act.

The stubborn fact that Ashland's FPC filed rates for natural gas do not constitute payment for helium is also vividly illustrated by the FPC proceedings which were an outgrowth of this very case. *Phillips Petroleum Company* v. *Ashland Oil & Refining Company*, 40 FPC 390, affirmed in *Ashland Oil & Refining Company* v. *FPC*, 421 F.2d 17 (6th Cir.). Ashland was held not entitled to collect from Phillips over one-half million dollars in admitted deficiencies in payments below the contract price because an FPC filing for the increase was not promptly accomplished. Significantly, the FPC took note of this helium case pending between the parties, and firmly stated that "under Section 11 of the Helium Act Amendments of 1960, the Commission has no jurisdiction over the price of helium."

In essence, Phillips is here attempting to obtain judicial repeal of Section 11 of the Helium Act, and to substitute for it a judicial judgment that helium should be subject to the FPC's rate regulation under the Natural Gas Act. This effort must fail, just as the same effort failed in *Grounds*.

CONCLUSION

Phillips has misconstrued *Phillips Petroleum Company* v. *Texaco*, 415 U.S. 125 as holding that federal law is irrelevant to this case. In fact, this Court repeatedly emphasized that federal law was governing to preclude the very defense which Phillips now seeks again to resurrect here. In our case, diversity jurisdiction exists, and there is no claim to federal question jurisdiction.

The alleged federal law question, as stated by Phillips, thus, simply does not exist. It appears to be merely a thinly veiled effort to again attempt to obtain a review of the final *Grounds* decision, which correctly defined the legal rights of the parties.

The petition should be denied.

Respectfully submitted,

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APPENDIX

Section 4 of the Natural Gas Act, 52 Stat. 822; 76 Stat. 72, 15 U.S.C. Sec. 717c, subsections (a)(b) & (c), provide:

"(a) All rates and charges made, demanded, or received by any natural-gas company for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges, shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

"(b) No natural-gas company shall, with respect to any transportation or sale of natural gas subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

"(c) Under such rules and regulations as the Commission may prescribe, every natural-gas company shall file with the Commission, within such time (not less than sixty days from the date this act takes effect) and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection, schedules showing all rates and charges for any transportation or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services."

Section 11 of the Helium Act, 74 Stat. 922, 50 U.S.C. Sec. 167i, provides in pertinent part:

"The provisions of the Natural Gas Act of June 21, 1938 (52 Stat. 821; 15 U.S.C. 717-717w), as amended, shall not be applicable to the sale, extraction, processing, transportation, or storage of helium either prior to or subsequent to the separation of such helium from the natural gas with which it is commingled. . ."